SECTION IX

UNITS-, BUILDING-, AND PROJECT-LEVEL RULES

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Following is a partial listing of rules governing the eligibility of a unit to be counted as a low income housing tax credit unit. For more information regarding unit eligibility, consult Section 42 of the IRS Code or a LIHTC textbook or guide.

Part 900 Definition of a Low Income Unit

Tax Credits "attach" to each qualified low-income unit, which is usually an apartment unit. However, a unit may be part of a duplex, triplex, etc. or a single-room occupancy (SRO) unit, a rented manufactured home or rented single-family house. In this manual, the term "project" includes both multifamily housing complexes and scattered site projects, and the rules apply to low-income units in any configuration.

Qualified units rented to or reserved for, eligible tenants:

- Must have substantially the same equipment and amenities (excluding luxury amenities such as a fireplace) as other units in the project; and
- Cannot be geographically segregated from other units in the project.

Units intended for eligible tenants must be comparable in size, location, and quality to those rented to other tenants. In the event a residential unit in a project which is not rented to an eligible tenant is above the average quality standards of the units rented to eligible tenants, then the basis in the project which is used to determine the amount of tax credits must be reduced by the portion which is attributable to the excess costs of the above standard units.

For a related topic, see Part 455 (Units that Have Never Been Occupied by a Qualified Residents).

Part 905 Mixed Income Projects

A mixed income LIHTC project is one that has both low-income and market-rate (also termed unrestricted) units and thus has an applicable fraction of less than 100% (see Part 415 for more information about the applicable fraction). Mixed income projects have special, complex considerations, such as the 140% / Next Available Unit Rule (see Part 915) and the Unit Vacancy Rule (see Part 920). Owners of mixed-income projects should have competent tax credit consultants review the project's lease-up and on-going management plan to ensure rental procedures maintain compliance with the program.

Part 910 Deeper Targeting / Agency Covenants

Some LIHTC projects have multiple (deeper) targeting levels for their low-income units. A project may have 100% applicable fractions, but have multiple or lower targeting levels for its low-income units. For example:

> *Golden Arms Apartments consist of 50 units and 100% applicable fraction. The owner selected of minimum 40/60 election. The owner set aside 20 units for residents at 60% AMGI (meets the 40/60 test), 20 units for residents at 50% AMGI, and 10 units for residents at 40% AMGI.*
>
> *Platinum Arms Apartments has a 100% applicable fraction and has elected a minimum set-aside of 20% @ 50%. To obtain extra point in the allocation scoring process, the owner elected to target 100% of the units at 40% of area median income.*

Some mixed income projects (which have an applicable fraction of less than 100%), in addition to having market rate units, may also have multiple targeting levels for its low-income units. For example:

> *Silver Arms Apartments consists of 75 units, of which 40 are low-income units and 35 are market rate (unrestricted units). The owner selected a minimum set-aside of 40% @ 60%. It has an applicable fraction of 40/75 (53.333%). Of the 40 LIHTC units, 20 are reserved at 60% AMGI, 10 are reserved at 40% AMGI, and 10 are ate 30% AMGI.*

Both the income and rent must be restricted at the particular AMGI level. For example, if the AMGI level is 40%, the household must be income-eligible at 40% AMGI and the rent must also be restricted at 40% AMGI. In addition, all AMGI levels must be distributed among all buildings and across all unit sizes (i.e. number of bedrooms) in a project. For example: It would not be permissible in a building containing one and two-bedroom units to have only one-bedroom units available as 30% AMGI and no two-bedroom units available as 30% AMGI. Also, in a project containing more than one building, it would not be permissible to place all 30% AMGI households in one building and reserve all of the other buildings for households at higher AMGI and market rate levels.

See MSHDA Policy #62 , which is included in Appendix C for more information regarding multiple (deeper) targeting. For information about income and rent limits, see Section V (Income Limits Rent Limits, and Utility Allowances). For a related discussion, see Part 415 (Applicable Fraction).

Part 915 140% / Next Available Unit Rule

Special Rules apply when a household's income increases above 140% of the current applicable income limitation (i.e., 140% above either 50% AMGI or 60% AMGI, based on the minimum set-aside elected for the project). For example:

> *The Smith household moved into the unit on 02/05/98 and was determined to be income-eligible at that time (initial occupancy). The owner/management agent of the project has recertified the Smith household for 2001. The income limit in effect on 02/05/01 for a three-person household was $26,500. At the time of the 02/05/01 recertification, the Smith household's income was determined to be $40,000, which exceeds 140% of the current income limit ($26,500 x 1.4 = $37,100). The next available unit rule is now triggered.*

If the income of the occupants of a qualifying unit increases to more than 140% of the applicable income limitation, the unit may continue to be counted as a low-income unit as long as two things happen:

(1) the unit continues to be rent-restricted and
(2) the next available unit of comparable or smaller size in the same building is occupied by a qualified low income household.

For purposes of discussing the next available unit rule in this compliance manual, the term "**creeper**" will be used to describe a unit that is occupied by a household that was income-eligible at the time of move-in but whose income, upon annual recertification, was/is determined to have increased to an amount that was/is in excess of the maximum allowable income. A "creeper unit" remains in compliance with LIHTC regulations, provided the next available unit rule is properly followed.

The term "**over-income**" is used to describe a unit that is occupied by a household whose income was in excess of the maximum allowable at the time of initial occupancy. An "over-income" unit/household is out of compliance with LIHTC regulations.

Part 915-A 140% / Next Available Unit Rule – Comparable Unit

The term "*comparable unit*" means a residential unit in a low-income building that is of comparable size or smaller than the "creeper" unit. For purposes of determining whether a residential unit is comparably sized, a comparable unit must be measured by the same method used to determine qualified basis for the credit year in which the comparable unit became available. The method will either be based on the square footage of the units or on the number of bedrooms in the unit. If the owner/management is unsure of the method used, then owner/manager should comply with both methods. In other words, the next vacant unit that has the same or less bedrooms and/or the same or less square footage must be made available to a low-income tenant in order to comply with the Next Available Unit Rule.

Part 915-B 140% / Next Available Unit Rule – Noncompliance

Noncompliance with the next available unit rule can have significant negative consequences. If any comparable unit that is available or that subsequently becomes available is rented to a non-qualified resident, all "creeper" comparably-sized or larger units for which the available unit was a comparable unit within the same building lose their status as low-income units. For example:

> *Michigan Villas is a mixed income project with one building containing 85 tax credit units. Of the 85 tax credit units, 11 are occupied by households whose incomes have increased to above 140% of the applicable income limit. Those 11 "creeper" units consist of four three-bedroom, five two-bedroom and two one-bedroom units. Unit #202, a two bedroom unit (not one of the 11 "creeper" households), is the next unit in the building to be vacated. To comply within the Next Available Unit Rule, Unit #202 must be rented to an income-eligible household. Instead, it is leased to a market rate household. Because an ineligible household became an occupant of Unit #202, all "creeper" units for which Unit #202 was comparably or smaller-sized will lose their status as tax credit units. Thus, all four of the three-bedroom and all five of the two-bedroom units (which are those units comparably sized or larger than Unit #202) can no longer be counted as tax credit units.*

Part 915-C 140% / Next Available Unit Rule – Applies Separately to Each Building

In projects containing more than one low-income building, the next available unit rule is applied separately to each building in the project. For example:

> *A project has two buildings, each of which contains 10 identical-sized units and each of which is 60% low-income. At recertification, two low-income units in Building A are "creepers", but no units in Building B are "creepers". If a market-rate tenant moves out of Building B, that unit can be rented to another market-rate tenant without violating the Next Available Unit Rule, because the "creeper" units in Building A do not affect Building B.*

Part 915-D 140% / Next Available Unit Rule – The Applicable Fraction of the Building Must be Maintained

Mixed-income buildings where units are different sizes may need to increase the percentage of low-income use over time to maintain compliance with the Next Available Unit Rule and applicable fraction requirements. For example:

Titanium Arms Apartments consist of a single building with 20 units.

Unit Size	*Sq. Feet*	*# of Units*	*Square Footage*
One-Bedroom	*750*	*10 Units*	*7,500 sq. ft/unit*
Two-Bedroom	*1,000*	*10 Units*	*10,000 sq. ft/unit*
TOTAL		*20 Units*	*17,500 sq. ft/unit*

This project is mixed-income and 14 of the 20 units are low-income. At the end of the first credit year, the building has rented up so that there are 7 low-income one-bedroom units and 7 low-income two-bedroom units. The applicable Fraction is the lesser of the Unit Fraction [14/20 = 70%] or the Floor Space Fraction [((7 x 750 sq. ft.) + (7 x 1,000 sq. ft.)) / 17,500 sq. ft. total = ((12,280 / 17,500) = 70.17%], or 70%.

At recertification, it is determined that the 2 two-bedroom units are now "creepers", triggering the Next Available Unit Rule. The next two units that become available for rent are one-bedroom market units. To comply with the Next Available Unit Rule, the owner rents these units to qualified low-income households. After leasing the two units to qualified households, the total number of low-income units is 16.

While the drop in Applicable Fraction is not a large one, it will trigger recapture and reduction of credit. The alternative is to retain the "creeper" units as rent-restricted, increasing the number of rent-restricted units in the building from 14 to 16 low-income units, and lowering the gross rental income for the building.

The owner of a low-income building must rent to qualified residents all comparable units that are available or that subsequently become available in the same building to continue treating the over-income unit as a low-income unit. Once the percentage of low-income units in a building (excluding the "creeper" units) equals the percentage of low-income units on which the credit is based, the "creeper" unit may be converted to a market-rate unit if the committed percentage of low-income use of the building is maintained (this will only be possible in a mixed-income building).

Part 915-E 140% / Next Available Unit Rule – Impact on Projects that Have 100% Applicable Fractions

The next available unit in a 100% low-income project is *always* rented to a qualified low-income household, so the Next Available Unit Rule does not change normal rental practice for a 100% low-income project. However, if a unit is rented inadvertently to a nonqualified household, all "creeper" units in the building will cease to be treated as low-income units, and the building will be subjected to recapture.

> Example: *A project consists of a single building with 20 identically sized apartments, all of which are set-aside for households at or below 60% AMGI. Over time, 9 units become "creepers", determined at the annual recertification of household income. As long as the units remain rent-restricted, the building is counted as 100% low-income. All the "creeper" residents continue to live in the building, and two years later the property manager inadvertently leases a unit to a household earning 62% AMGI. At that time, there is recapture for the unit rented to the nonqualified household, as well as for the 9 over-income units. The low-income percentage of the building drops from 100% to 50%. Even if the nonqualified tenant moves out and is replaced with a qualified low-income household, the over-income units are no longer treated as low-income units.*

Part 915-F 140% / Next Available Unit Rule – Transfers Within a Building

As long as a household was qualified at initial occupancy, it will continue to be qualified if the household moves to another unit in the same building, even if the household income is above the applicable income limit at the time of the move. The vacated unit assumes the status the newly occupied unit had immediately before the current resident occupied it. The newly occupied unit adopts the status of the vacated unit. Thus, if a current resident, who was initially qualified but whose income subsequently increases to an amount in excess of the current applicable income limitation at annual recertification moves from a "creeper" unit to a vacant unit in the same building, the newly occupied unit is treated as a "creeper" unit. If a resident moves from one building to another, that move triggers a new tenancy, and the household must meet the initial income certification requirements with its current income. For more information on transfers, see Part 925.

For additional information regarding deeper targeting and the next available unit rule, see 26 CFR 1.42-15 (Available Unit Rule), which is included in Appendix G, and LIHTC Policy #6 (Deeper Targeting and Multiple AMGI Levels), which is included in Appendix C of this manual.

For a related discussion, see Part 1080 (Interfacing LIHTC with other Government Housing Programs).

Part 920 Unit Vacancy Rule

The Unit Vacancy Rule (also called as the Vacant Unit Rule) is a corollary to the Next Available Unit Rule. If a tax credit unit becomes vacant, it still counts as a Tax Credit unit as long as reasonable attempts are made to rent that unit or any available units of comparable or smaller size in the project to a tax credit qualified applicant before renting any comparable or smaller sized units to an ineligible household. Failure to invoke this rule may result in a reduced applicable fraction (qualified basis violation), which may disallow owners from claiming credit on all affected units. Units cannot be left permanently vacant and still satisfy the requirements of the tax credit program. The owner or manager must be able to document attempts to rent the vacant units to eligible tenants. The Unit Vacancy Rule is applied on a project-wide basis and not on a building basis.

For a related topic, see Part 455 (Units That Have Never Been Occupied by a Qualified Residents).

Part 925 Unit Transfers

To a different Building – When an existing household moves from one LIHTC unit to another in a different building, it is treated as a new move-in. All application, certification, and verification procedures must be completed for the transferring resident(s), including the execution of new income and asset verifications to determine eligibility the same as is done for a new, first-time occupant.

Within the Same Building – When an existing household moves to a different LIHTC restricted unit in the same building, the newly occupied unit adopts the status of the vacated unit. Thus, if a current resident whose income exceeds the applicable income limitation moves from an over-income unit to a vacant unit in the same building, the newly occupied unit is treated as an over-income unit. The vacated unit assumes the status the newly occupied unit had immediately before it was occupied by the current resident. This provision applies only to households under leases entered into or renewed after September 26, 1997 and is not retroactive. For prior leases, all transfers, including those within the same building, must have been treated as new move-ins.

MSHDA/LIHTC does not require that interim recertifications be conducted for tenants who are transferred within the same building, however, the date of the transfer must be clearly identified in the tenant file. The household must continue to be recertified on the anniversary of the original date it moved into the building. For a "transfer" to a different building (which is actually a new move-in), all of the initial certification requirements discussed in Part 600 must be completed prior to move-in to the new unit. For related discussion, see Part 915-F (140%/Next Available Unit Rule – Transfers within a Building).

Part 930 Common Area Residential Unit

A resident manager's unit may be considered in one of two ways:

1. The manager's unit can be considered as common area or other special facility within a rental project that supports and/or is reserved for the benefit of all the rental units. Under this interpretation, the unit is excluded from the low-income occupancy calculation and the unit can be used by the manager without concern as to the effective rent being charged to or the income level of the manager. If this option is elected, the unit occupied by the resident manager is included in the building's eligible basis, but excluded from the applicable fraction for the purposes of determining the building's qualified basis; or

2. The manager's unit could be treated as a rental unit and the unit could be included in the low-income occupancy percentage calculation for the LIHTC building. Under this interpretation, the income level of the manager and the rent charged will affect the low-income occupancy percentage calculation for the building. The manager's unit could be considered a qualified low-income unit (the rent is restricted to a qualifying amount and the resident manager is certified as a low income tenant). For example:

   The project contains one building. This building has 25 units, one of which is a manager's unit. At the end of the first year of the credit period, all units are rented except the manager's unit which remains unoccupied. The building's applicable fraction would be 96% (24/25 assuming all units are the same size). Therefore, if the building's eligible basis is $700,000, its qualified basis would be only $672,000. If the manager's unit were considered as common are, it would not be included in either the numerator or the denominator in calculating the applicable fraction. If not included, the building's applicable fraction would be 100% (24/24) and its qualified basis would be $700,000.

For additional Information regarding managers/employees as tenants, see part 845.

Part 930-A Common Areas – Impact on The Applicable Fraction

There is no tax credit penalty for having a Common Area Unit in a project. When the percentage of low-income use is calculated, the Common Area Unit is ignored. Example:

Assume a building in a 100% low-income project has 100 units, and one unit is the manager's unit. Calculate the low-income use of that building (based on Unit Fraction) as follows:

Low-Income Units:	*99 units*
Total Residential Units:	*99 units*
Low-Income Percentage:	*99/99 = 100%*

If at a future time, a common are unit is no longer used as a manager's unit, and it is then rented as a qualified low-income unit, the low-income use stays at 100%:

Low-Income Units:	*100 units*
Total Residential Units:	*100 units*
Low-Income Percentage:	*100/100 = 100%*

The same analysis is used in calculating the Floor Space Fraction – disregard the area of the Common Area Unit in both denominator and numerator. Again, assume a building has 100 units, all 2-bedroom unit at 10,000 square feet each. The low-income use based on the Floor Space Fraction would be:

Area of low-income units:	*10,000 sq. ft/unit x 99 units = 99,000 sq. ft*
Total area of all units:	*10,000 sq. ft/unit x 99 units = 99,000 sq. ft*
Low-income percentage:	*99,000 sq. ft / 99,000 sq. ft = 100%*

All changes in common unit designations must be approved by MSHDA prior to implementing the change, as discussed in MSHDA Policy #10, which is included in Appendix C.

Part 930-B Designating a Unit as Common Area

The owner must designate an employee-occupied unit as either common space or as a low-income residential unit. The designation as common space is made by completing a Resident Manager's/Employee Occupied Unit Designation Statement (LIHTC Form #047), which is included in Appendix A of this manual. This form must be competed and submitted with the first annual certifications prepared for the project. The common area residential unit will not be recognized as such unless the owner has completed LIHTC Form #047 prior to the unit becoming occupied. If the option to designate the manager's unit as a low-income rental unit is selected, the appropriate monitoring fee must be paid for this unit(s).

The owner must identify the unit number (along with the square footage and number of bedrooms) and street address of the building in which the manager's unit will be located. Once this unit has been identified, it cannot be relocated without first obtaining approval from the LIHTC Section of MSHDA. The request to relocate the unit must be submitted to MSHDA in writing by the owner of the project along with a revised Resident Manager's/Employee-Occupied Unit Designation Statement (LIHTC Form #047).

While moving a Common Area Unit from one building to another may be allowed by the Authority, if the change would result in a reduction in the low-income use of any building in the project, the move will not be allowed. The provision for the inclusion of a manager's unit as common are also may not be available for certain projects (particularly many projects that received an allocation of credit prior to September 9, 1992).

For more information regarding the manager's unit, see IRS Revenue Ruling 92-61, which is included in Appendix H and MSHDA Policy #10 (Common Area Unit Policy), which is included in Appendix C. For information regarding managers as tenants, see Part 845. For information regarding annual compliance certifications, see Part 715. For more information regarding monitoring fees, see Part 725.

Part 935 Common Space (Non-Residential)

Non-residential common space includes hallways, leasing offices, community recreation rooms, utility rooms, community laundry space, etc.

Part 940 Units Must be Suitable for Occupancy

Tax credits are available only for units that are suitable for occupancy. Section 42 states that "suitable for occupancy" will be determined under regulation issued by the IRS taking into account local health, safety, and building codes. New compliance regulations regarding physical condition standards were released in 2000. For more information regarding physical condition standards, see Part 1020 (Physical Condition Standards) and Part 770 (Physical Inspections).

Part 945 Units Must Be for Non-Transient Use

Under program requirements, a unit cannot be tax credit eligible if it is used on a transient basis. A unit is deemed to be transient if the initial lease term is less than six months. The term "transient" is not defined in Section 42 or other IRS regulations, but the legislative history of Section 42 describes a "safe harbor" which states that leases with an initial term of 6 months, which can then revert to a month-to-month tenancy, are considered "non-transient". For acquisition/rehabilitation projects, there must be at least a six-month lease at initial occupancy or a six-month addendum for in-place (existing) tenants who do not have six months left on an existing lease when the building is placed in service.

The only exception to the six month lease rule are single room occupancy (SRO) units, which may be month to month so long as they are transitional for homeless or other individuals seeking permanent housing. Federal Rules allow for month-by-month leases for the following types of housing:

1. SRO units in projects receiving McKinney Act and Section 8 Moderate Rehabilitation Assistance.
2. SRO units intended as permanent housing and not receiving McKinney Act Assistance.
3. Units intended as transitional housing that are operated by a governmental or nonprofit entity and providing certain supportive services.

For information, see Part 840 (Transient Persons) and Part 675 (Lease Agreements).

Part 950 Units Must be For Use by the General Public

A residential rental unit must be for use by the general public in order to be eligible for tax credits. A residential rental unit is for use by the general public if the unit is rented in a manner consistent with housing policy-governing nondiscrimination, as evidence by rules or regulations of the Department of Housing and Urban Development (HUD) and discussed in HUD Handbook 4350.3 (or its successor). A residential rental unit that is provided only for a member of a social organization or provided by an employer for its employees is not "for use by the general public" and is not eligible for tax credits.

Under program requirements, tax credit units must be available for use by the general public. Owners are allowed to establish preferences for certain population groups (e.g. homeless individuals, persons with disabilities, etc.). These preferences, however, must not violate HUD's anti-discrimination policies.

Part 955 Ineligible Facilities

No hospital, nursing home, sanitarium, live-care facility, retirement home providing significant services other than housing, dormitory, or trailer park is eligible to be a low income housing tax credit project. Commercial space within a tax credit development is not tax credit eligible.

Part 960 Commercial Space

Projects that contain commercial space are termed "mixed-use" projects. Commercial space is not eligible for tax credits. Commercial space includes operations such as day care centers and beauty salons on the premises, for which non-tenants pay a fee. Also considered to be commercial space are swimming pools, club houses, exercise facilities and garages for which a fee is charged.

The IRS recognizes that people earn money on the side. LIHTC tenants are permitted to operate businesses in their units provided the space is not redesigned in such a way as to attract only future business operations (e.g. doctor's office) and the unit can be re-rented on a general public use basis. It is non permissible for tenants to deduct (write-off) a portion of an LIHTC residential unit as business space on their income taxes. The LIHTC unit must be the tenant's principal place of residence. Any business use of the residence must be in compliance with zoning laws or other government ordinances.

The owner/manager has the right to refuse to allow the apartment to be used as a day care center. For information on calculating household income for self-employed persons and for tenants who are business owners, see Part 635.

Part 965 Community Service Facilities

For credit allocations after December 31, 2000, community service facilities may be included in some tax credit properties that are located in a qualified census tract. These community service facilities may serve non-residents, as long as these persons are primarily low-income (60 percent or less of median income). Examples of community service facilities include senior programs and job training.

Part 970 Building Identification Numbers (BIN #)

All LIHTC buildings are assigned a seven-digit number. This number is assigned by MSHDA at the time the building is allocated credit. Each building will have a different BIN number. The first two digits represent the year that the credit was allocated to the project. For example, Michigan Villas has two buildings, with the BIN#s MI-87-12301 and MI-87-12302. The "87" indicates that the building was allocated credit in the year 1987. The last two digits indicate the building number in the project, either "01" or "02". See Part 430 (Allocation and Year Of The Credit) and IRS Notice 88-91 (Building Identification Numbers), which is discussed in Appendix H for more information.

Part 975 LIHTC Project Numbers

Each building within the project is assigned a building identification number (as discussed in Part 970). Each project (which could be comprised of one or more buildings) is assigned a six-digit number. The project number is usually a derivative of the building identification number(s). For example, a project with the building identification numbers MI-87-12301 and MI-87-12302 would be given the project number "870123".

LIHTC Projects that have a MSHDA loan or grant may have a three or four digit MSHDA project number in addition to an LIHTC project number.